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In the Supreme Court of the United States

GUADALUPE L. GARCIA, JR., *ET AL.*,
Petitioners,

v.

THOMAS VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ROSEMARY LOVE, *ET AL.*,
Petitioners,

v.

THOMAS VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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STATEMENT

The petition explained that this Court's review is needed to address an important, recurring issue on which the D.C. Circuit has circumvented *Bowen v. Massachusetts*, 487 U.S. 879 (1988), in favor of its own contrary precedent. The D.C. Circuit's departure from *Bowen* is all the more pronounced because it also runs counter to Congress' repeated efforts to remedy the administrative lawlessness that petitioners' claims address. Let there be no mistake, it is undisputed that the Department of Agriculture ("USDA") has flouted legal norms for decades. The courts have now exacerbated that misconduct by drawing an irrational line that denies to Hispanic and women farmers the judicial forum Congress intended (and that the courts have afforded to African American and Native American farmers who challenged precisely the same agency wrongdoing). Accordingly, as detailed in the petition, the question presented in this case is significant and will have a powerful practical impact. Respondent's brief in opposition offers no supportable basis for denying review and, moreover, offers no defense whatsoever for the continuing unlawful conduct.

Having perpetrated one of the most odious episodes of governmental lawlessness in American history (Pet. App. 188a, 214a, 223a-224a) and having sabotaged Congress' attempt to rectify the pervasive lawlessness (Pet. App. 235a-237a), the "USDA" now seeks to prevent tens of thousands of Hispanic and women farmers from having their claims "resolved in an expeditious and just manner." (Pet. App. 253a)

In so doing, respondent seeks to obscure the inexorable link between petitioners' failure-to-investigate claims and the ability of tens of thousands of Hispanic and women farmers who are the victims of this unprecedented and admitted governmental lawlessness to have their claims resolved. (Opp. 6n.1, 16)

It is undisputed that petitioners' complaints were two of four virtually identical complaints filed in the district court on behalf of African American, Native American, Hispanic and women farmers. While African American and Native American farmers were granted class certification with respect to their claims of discrimination in both USDA's farm credit and non-credit farm benefit programs on the basis of USDA's admitted failure to investigate discrimination complaints, Hispanic and women farmers were denied class certification on virtually identical facts. (Pet. 6-7)

ARGUMENT

1. Respondent's assertion that the interlocutory posture of the case makes it unsuitable for further review is incorrect. The cases upon which respondent relies, *Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967) (*per curiam*) and *VMI v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of cert.), are clearly distinguishable from the instant cases. In *Brotherhood of Locomotive Firemen*, this Court denied review of certain contempt orders because, the court of appeals, in remanding the case, directed the district court to consider whether there was in fact contempt and, if

so, whether it warranted any of the coercive fines originally ordered by the district court. 389 U.S. at 328. The case clearly was not ripe for review inasmuch as it was uncertain whether petitioner would ultimately be subject to any liability.

Similarly, in *VMI*, petitioner sought review of an order that had been vacated and remanded by the court of appeals. Justice Scalia observed that the denial of the petition was appropriate because there was no final judgment entered and, in remanding the case, the court of appeals had "expressly declined to rule on the 'specific remedial course that the [petitioner] should or must follow hereafter' and suggested permissible remedies other than compelling [VMI] to abandon its current admissions policy." 508 U.S. 946. In stark contrast, in the instant cases, denial of the petition effectively sounds the death knell to the claims of tens of thousands of Hispanic and women farmers who are the victims of USDA's admitted discrimination (Pet. 21-26) and sabotage of Congress' efforts to rectify that discrimination. (Pet. App. 235a-237a) Additionally, denial of the instant petition will extinguish the claims of untold numbers of Native American farmers who are victims of the same discrimination as petitioners because respondent is poised to move to decertify the Native American class should the instant petition be denied. (Opp. 6 n.1)

2. Respondent ignores the plain meaning of this Court's express holding in *Bowen*, 487 U.S. at 903, that "When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously

established special statutory procedures relating to specific agencies." Accordingly, there is no merit to respondent's contention that "there is no basis for construing the Court's language in *Bowen* as imposing a temporal restriction on the types of alternative remedies that would preclude resort to the APA under Section 704." (Opp. 12) Such a temporal restriction is clearly evident from the Court's express language in *Bowen*.

Respondent also errs in asserting that "petitioners do not cite a single case endorsing their view of *Bowen* or 5 U.S.C. 704." (Opp. 13) The petition (at 10) makes clear this Court expressly reaffirmed the temporal restraint placed on the "adequate remedy in a court" language of APA 704 in *Bowen*, noting that "Congress intended by that provision *simply* to avoid duplicating previously established special statutory procedures for review of agency actions." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (emphasis added); *see also Esch v. Yeuter*, 876 F.2d 936 (D.C. Cir. 1989) (Pet. 16-17) And, this Court left no doubt concerning "the previously established special statutory procedures relating to specific agencies." *Bowen*, 487 U.S. at 903. (Pet. 13-14)

Respondent simply ignores the express terms of this Court's holdings in *Bowen* and *Darby* and instead speculates concerning the supposed intent of Section 704. (Opp. 12-13) Unlike respondent's speculation, this Court's express temporal restraint on Section 704's "adequate remedy" language is wholly consistent with what the Court concluded to be the APA's "central purpose." As this Court has repeatedly made clear, "the [APA's] 'generous review

provisions' must be given a 'hospitable interpretation'" and that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review." *Abbott Labs v. Gardner*, 387 U.S. 136, 140, 141 (1967). Indeed, *Bowen* invoked the temporal restraint imposed by Section 704 in explaining that "[t]he exception that was intended to avoid such duplication should not be construed to defeat *the central purpose of providing a broad spectrum of judicial review of agency action*," and "'that the [APA's] "generous review provisions" must be given a "hospitable" interpretation.'" *Bowen*, 487 U.S. at 903-04 (quoting *Abbott Labs*, 387 U.S. at 140-141) (emphasis added and footnotes omitted). Thus, despite respondent's assertion to the contrary (Opp. 13-14), the court of appeals' interpretation of 5 U.S.C. 704 is not only inconsistent with this Court's decision in *Bowen*, but inconsistent with the "central purpose" of the APA.

The temporal restriction on Section 704 is not only evident from the express terms of this Court's holdings in *Bowen* and *Darby*, it is also evident from a comparison of the plain language of Sections 10c and 12 of the APA. This Court held that, in enacting the APA, Congress intended to provide "a broad spectrum of judicial review of agency action." In doing so, Congress looked to review procedures that existed with respect to specific agencies at the time it enacted the APA and sought not to duplicate such review. With respect to subsequently enacted legislation, again in keeping with providing "a broad spectrum of review of agency action," Congress made clear that such legislation would not displace APA

review unless Congress explicitly stated its intention to do so in the legislation.[1] *See Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955) (quoting APA § 12). ("'[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.").

3. Respondent persists in mischaracterizing petitioners' cases as involving only credit claims and arguing that petitioners' failure-to-investigate claims are barred because ECOA provides an adequate remedy for their credit discrimination claims. Respondent is incorrect. First, the argument rests entirely upon respondent's misreading of this Court's express holding in *Bowen*, and reaffirmed in *Darby*, that APA 704 precludes duplication of review procedures that were "previously established" at the time Congress enacted the APA.

Second, inasmuch as the court of appeals, as respondent noted (Opp. 6-7), held that the failure-to-investigate claims are not credit transactions covered by ECOA, a court exercising injunctive authority pursuant to ECOA could not require USDA to investigate complaints of discrimination in the administration of its credit programs. However, because USDA's refusal to investigate discrimination

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[1] Respondent's waiver argument (Opp. 14 n.2) is altogether erroneous. *See, e.g.*, *Garcia* Appellants' Opening Brief at 28-32 filed September 29, 2008; *Garcia* Appellant's Reply Brief at 7-8 filed November 12, 2008 and Appellants' Corrected Petition For Rehearings *En Banc* at 5 and n.5 filed June 8, 2009. *See Brewster v. Commissioner*, 607 F.2d 1369, 1373-74 (D.C. Cir. 1979).

in its credit programs violated its rules requiring it to investigate discrimination complaints, pursuit of the discrimination claim would not bar an APA claim based upon USDA's violation of its rules. *See McKenna v. Weinberger*, 729 F.2d 783, 791 (D.C. Cir. 1984) (holding that an agency's failure to follow its own regulations gives rise to a separate cause of action in addition to the underlying discrimination charge because "*the agency, whether its motive was legal or illegal, failed to conform to its own regulations.*") (emphasis added). It is a basic tenet of law that an agency must comply with its own regulations. *See, e.g., Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Esch*, 876 F.2d at 991 and n.163. Therefore, a discrimination claim and an APA claim may be pursued concurrently because the claims have independent bases. Moreover, ECOA could not possibly provide an adequate remedy, under any definition of the term, for USDA's refusal to investigate discrimination in the administration of its *non*-credit farm benefit programs. (Pet. 18-19)

4. Respondent's remaining arguments ignore the nightmarish administrative reality that strongly favors certiorari. In short, respondent contends that because petitioners did not avail themselves of the supposedly adequate alternative procedure in Section 741, petitioners are precluded from seeking injunctive relief with respect to USDA's continued refusal to investigate discrimination complaints of Hispanic and women farmers. (Opp. 14-16) Contrary to respondent's imagined scenario, the discrimination at issue is not merely a relic of a bygone era but it continues to this very day. Similarly, USDA's refusal to investigate

discrimination complaints that prompted Congress to enact Section 741 similarly persists. (Pet. App. 239a-252a, 260a-270a) There is no basis in law for respondent to contend that because petitioners did not undertake the futile act of pursuing an indisputably sabotaged and flawed process that they are now precluded from obtaining injunctive relief in the form of an order requiring respondent to conduct investigations and to implement proper procedures to insure that administrative complaints are properly investigated. (Pet. 25; Pet. App. 235-237a) Respondent has indisputably ignored an explicit congressional directive to do so. This Court's review is thus necessary to assure that respondent ceases its continued flouting of Congress' express intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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